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WONG HAI ONG

v.

BANQUE NATIONALE DE PARIS

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HIGH COURT SABAH AND SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[ORIGINATING SUMMONS NO: 24-192-99-111(11)]
22 FEBRUARY 2000

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CIVIL PROCEDURE: *Execution - Stay - Application for - Special circumstances test - Nugatory principle - Whether applicable - Whether stay to be granted*

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The respondent, had obtained a judgment against the applicant in the High Court of Singapore to which the latter did not appeal against. The respondent then had the judgment registered in the High Court of Kuching. The applicant's attempt to set aside the registration of the said judgment failed.

This suit arose from the applicant's application for stay of execution of the said judgment pending appeal under O. 52 r. 12 of the Rules of the High Court 1980 which was supported by an affidavit.

*e***Held:***f*

[1] Section 73 of the Courts of Judicature Act 1964 and s. 13 of the Rules of the Court of Appeal 1994 provide that an appeal does not operate as a stay of execution. The court is rendered with an unfettered and absolute discretion to grant or refuse an application for stay.

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[2] In an application for stay of proceedings or execution, the applicant has to show to the court by an affidavit that there are special circumstances for the stay.

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[3] The said affidavit did not disclose any special circumstances for the court in considering this application. Merits alone, in an application, would not qualify as special circumstances. There were no special circumstances shown by the applicant to move this court to exercise its discretionary power.

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[4] An appeal would be nugatory if stay is disallowed, *eg*, by reason of the poverty of the respondent. However, the nugatory principle is not applicable here.

[5] The respondent was an established financial institution, and in the event the applicant is successful in his appeal, there was no doubt that the respondent would be able to pay any damages that may occur.

[Application for stay dismissed.]

Case(s) referred to:

Jong Chuk v. Chong Tung Sang & Ors [1999] 6 CLJ 574 (*refd*)
Kerajaan Malaysia v. Dato Hj Ghani Gilong [1995] 3 CLJ 161 (*refd*)
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 (*refd*)
Lee Kuan Yew v. Jeyaretnam JB [1991] 1 MLJ 83 (*fol*)
Monk v. Bartram [1891] 1 QB 346 (*refd*)
Serangoon Garden Estate v. Ang Seng [1953] 19 MLJ 116 (*refd*)
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 (*fol*)
Tropiland Sdn Bhd v. DCB Bank Bhd & 2 Ors [2000] 1 CLJ 568 (*refd*)
Wilson v. Church (No 2) (*refd*)

Legislation referred to:

Courts of Judicature 1964, s. 73
Rules of the Court of Appeal 1994, r. 13
Rules of the High Court 1980, O. 52 r. 12

Other source(s) referred to:

Halsbury's Laws of England, 3rd edn, vol 16, p 35

For the plaintiff - Stephanie Ting (Gabriel Wong with him); M/s Ting Goh & Assoc
For the defendant - Rosleenda Sayumi Ismail; M/s Idris & Co

Reported by Bhawani Mano

JUDGMENT

Muhammad Kamil Awang J:

Grounds Of Decision

The respondent obtained in the High Court of Singapore, a judgment against the applicant and there had been no appeal against the judgment by the applicant. Subsequently the respondent had the judgment registered in the High Court of Kuching. The applicant had applied to set aside the registration of the said judgment but failed.

This is the applicant's application for stay of execution pending appeal under O. 52 r. 12 of the Rules of the High Court 1980 (encl. 27) supported by an affidavit of Wong Hai Ong affirmed on 21 December 1999. The said affidavit did not disclose the special circumstances for the consideration of the court in this application.

- a* It does not seem necessary to emphasise and repeat the importance of an affidavit in support of an application for stay, castigating observations which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence or inadvertence or call it what you may, choose to pay them scant or no heed at all, and I must say they do so at their peril.
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It is trite law that an appeal does not operate as a stay of execution – s. 73 of the Courts of Judicature Act 1964 and r. 13 of the Rules of the Court of Appeal, 1994. The court has an unfettered and absolute discretion to grant or refuse an application for stay.

- c* It is well settled that in an application for stay of proceedings or execution, the applicant has to show to the court by an affidavit that there are special circumstances for the stay.

- d* *Halsbury's Laws of England* (3rd Edn) vol. 16, p. 35 states:

The Court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on an affidavit unless the application is made at the hearing.

- e* Brown J in *Serangoon Garden Estate v. Ang Seng* [1953] 19 MLJ 116 said:

There is no rule or practice limiting the exercise of his discretion. But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until the appeal is determined, unless the unsuccessful party can show special circumstances to justify it.

- f* In *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, Hashim Yeop Sani J (as he then was) said at p. 407:

- g* The law on the granting of an order for stay of execution has been examined a number of times in the courts of this country. It is trite law that the court has an absolute and unfettered discretion to grant or refuse an application for stay. As a rule the court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application.

- h* However, the learned judge did not agree with the proposition as enunciated in *Serangoon Garden Estate* (*supra*) that the merits of the appeal is a relevant consideration, despite saying that the case laid down the general principles regarding a stay of execution because the learned judge went on to state, after citing *Monk v. Bartram* [1891] 1 QB 346 that:

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allegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances.

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The learned judge was of the opinion that merit in an appeal cannot constitute special circumstances. Similarly, the case of *Lee Kuan Yew v. Jeyaretnam JB* [1991] 1 MLJ 83, at p. 85 also speaks in a similar vein, viz. "However, the fact that there may be strong grounds for an appeal is not by itself a reason for granting a stay." See also *Jong Chuk v. Chong Tung Sang & Ors* [1999] 6 CLJ 574; [1999] 6 MLJ 160.

b

An appeal would be nugatory if stay is disallowed, e.g. by reason of the poverty of the respondent. The nugatory principle is well illustrated by the case of *Wilson v. Church* (No 2) [1972] 12 Ch D 454: where a stay pending must be supported by special circumstances. In the case a representation brought by a bondholder (W.M. Wilson) a railway company, on behalf of himself and other bondholders, against the company, claiming that the money advanced by the bondholders should be returned to them, instead of being applied in the undertaking of the railway company. Judgment was given to the plaintiff with costs, and it was ordered that the money should be forthwith distributed among the bondholders.

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Lord Cotton LJ said:

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I am of the opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit, they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.

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The principle of special circumstances found support in a number of cases in this country, *inter alia*, the Federal Court cases of *Kerajaan Malaysia v. Dato Hj Ghani Gilong* [1995] 3 CLJ 161; [1995] 2 MLJ 119 and *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 MLJ 105. In a very recent Court of Appeal case of *Tropiland Sdn Bhd v. DCB Bank Bhd & 2 Ors* [2000] 1 CLJ 568; [2000] 1 AMR 766, where it was held that on the facts, no irreparable harm would befall the applicant, nor would the applicant be prejudiced in the event that the applicant's application for stay of execution of the writ was disallowed. Any losses, if any, the applicant may suffer could easily be quantified, and/or recovered in the event the applicant was successful in its appeal. It was clear therefore that there was no special circumstances warranting the grant of the application. Merits alone in an application, does not constitute special circumstances.

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a In this case, the respondent Banque Nationale De Paris, is an established financial institution, and in the event that the applicant is successful in the appeal, there is no doubt of the respondent's ability to pay any damages that may occur.

b In my judgment, the nugatory principle does not hold water here. There are no special circumstances shown by the applicant to move this court to exercise its discretionary power. In the circumstances, I disallowed the application for stay pending appeal with costs to the respondent.

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